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IN THE

Supreme Court of the United States

Term, 1949.

DAVID DARCY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

WILLARD S. CURTIN,
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Respondent respectfully sets forth:

The Petition for Certiorari relies primarily on the contention that Petitioner's Constitutional rights were violated in that he was not present at a view held at the Feasterville Tavern on the 8th day of June, 1948, and, secondly, that his Constitutional rights were violated by the Court in its charge in relation to the presumption from the use of a deadly weapon.

These arguments will be answered separately.

I. View.

It is our contention that *Snyder v. Massachusetts* (291 U. S. 97), which controls the present case, was well decided and considered by your Honorable Court and should not be overruled at this late date.

The Petitioner has attempted to point out differences between *Snyder v. Massachusetts* and the case now before your Honorable Court.

The Petitioner points out that in the *Snyder* case there was a Statute which provides, "The Court may order a view by a jury impaneled to try a criminal case." (General Laws of Massachusetts, Chapter 234, Section 35), whereas in Pennsylvania there is no statutory provision for a view. It is the contention of the Commonwealth that if a State may by statute authorize its Courts to conduct a view without violating the Federal Constitution, the Courts of a State may also do the same without violating the Federal Constitution. The question of whether a State Statute is necessary to allow a view to be conducted, would appear to be purely a question of State law and would not involve any Federal question. Certainly if it is not violation of due process to allow a view to be conducted under a State Statute, it would not be a violation of due process to do so in another State simply because that State had not deemed it necessary under its own laws to pass such a Statute. It therefore would appear that the Statute involved in the *Snyder* case would make no substantial difference to the present case.

The Petitioner further claims that his Constitutional rights were violated in that he was not present at the view. It is to be noted that although counsel for Petitioner at the trial objected to the view generally, at no time was any objection made to the fact that Petitioner was not taken to the view. Although failure to object would not waive substantial Constitutional rights, it is the contention of the Commonwealth that the objection made to the view has no bearing on this question. It could as easily be argued that had Petitioner's counsel objected at the beginning of the trial to a trial being held under any circumstances, this would cover all possible later irregularities without the necessity of specific later objections.

Petitioner at several places makes note of the fact that the Court was not in adjournment during the time of the taking of the view and that, consequently, it must be considered as part of the trial. The Commonwealth contends that whether the Court was in session or adjourned is

purely a procedural matter and of no consequence as to substantial Constitutional rights. The right of the Defendant to be present at all stages of the trial is based primarily on the right of the Defendant to cross-examine witnesses produced against him and his absence from the viewing of the premises did not prejudice this right.

Petitioner makes note of the fact that this right is also to allow the Defendant an opportunity of observing the reactions of the jurors. If this be the reason, then it might just as plausibly be argued that a Defendant should have the right to observe the jurors and all of them from the time the jury is sworn until it renders its verdict, including the times when they are eating, sleeping, etc.

Petitioner at various places throughout the brief and argument insinuated that the jurors, the Judge and other persons who were present at the view, "rambled around the countryside". There is no indication of this whatsoever. They went to the Feasterville Tavern where they observed the tavern and the immediate surrounding vicinity as set forth in the stipulation, and then returned to the Court House.

Another distinction which Petitioner suggests between the *Snyder* case and this case is that in the *Snyder* case the Defendant took the stand and admitted his presence at the scene of the crime. Although the Petitioner did not take the stand in the present case, it should be borne in mind that he also offered no evidence in his own defense other than by cross-examination of Commonwealth's witnesses. There was also admitted into evidence the statement of the Petitioner. This statement was taken under such circumstances as to clearly meet all the tests of due process and Petitioner does not now contend that the method of obtaining this statement in any way violated his Constitutional rights. In this statement he freely admitted his presence at the scene of the crime and his participation in the robbery in the tavern and the subsequent escape. The fact the Petitioner did not take the stand would there-

fore be no basis for differentiating this case from the *Snyder* case.

It is the contention of the Commonwealth that a careful reading of the case of *Snyder v. Massachusetts* indicates that the present case is in accord and meets all of the tests and requirements and safeguards enumerated in that case. We fail to see how any of the Constitutional rights of the Defendant were violated by the mere conducting of the view in his absence.

II. Trial Court's Charge Regarding the Presumption "In the Use of a Deadly Weapon".

The Petitioner asserts that the Fourteenth Amendment was violated by the Trial Court charging the jury as follows—R-875:

> "One who uses a deadly weapon upon another at some vital part with a manifest intention to use it upon him, must in the absence of qualifying facts be presumed to know that his act is likely to kill, and knowing this, must be presumed to intend death, which is the probable and ordinary consequence of such an act. Furthermore, when one so uses a deadly weapon upon another without sufficient cause or provocation, he must be presumed to do it wickedly or from a bad heart."

This is almost verbatim the charge used in the leading Pennsylvania case of *Commonwealth v. Drum*, 58 Pa. 9, page 17. This case decided in 1868 has been consistently followed by the Pennsylvania Courts to the present day. In almost every murder case wherein a deadly weapon was used, the substance of this charge has been given. We know of no case, and Petitioner cites no case, wherein the Supreme Court of Pennsylvania or your Honorable Court have criticized this charge or in any way indicated that it might conceivably violate any Constitutional rights of an accused. It would seem improbable to us that if such a charge violated the Fourteenth Amendment of the United

States Constitution, such would not have been challenged and so decided many years ago.

It is also the contention of the Commonwealth that the presumption set forth in the charge has a broad basis in fact and it is not such a presumption as totally lacking in reason. The jury, however, was carefully warned that they need not accept this presumption. As interpreted by the Pa. Courts and as jurors are instructed, it is merely a permissible inference from which a jury under Pennsylvania Law is justified in finding the specific intent to kill.

This charge was more than the Petitioner was entitled to under the facts of this case. The evidence was overwhelming that the actual slaying of Kelly occurred during the course of a robbery. It is the law of Pennsylvania that any killing done during the Commission of a robbery is murder in the first degree regardless of intent. It, therefore, would be most unlikely that the jury concerned itself with whether or not the shot was fired with specific intent to kill. The Petitioner claims that his Constitutional rights were violated because it is impossible to tell whether the jury rendered its verdict on the theory of an intentional killing or on the theory of a killing occurring during the commission of a robbery. The only possible difference this could have made in the verdict which the jury rendered would be on the question of the penalty. Under Pennsylvania Law, in cases of murder of first degree, it is solely within the discretion of the jury to fix the penalty either at death or life imprisonment. We do not believe that matters which the jury considered in fixing the penalty involves any Federal Constitutional question regarding the rights of an accused to a fair trial. The determination of the penalty for crimes is normally within the discretion of the Trial Judge within limits defined by Statute. The matters which the Judge may consider in imposing sentence are not confined to the strict rules of evidence. Similarly, a jury might well consider before determining which alternative sentence to render, matters that would not be admissible in evidence in determining the guilt or

innocence of the Defendant. As we understand Petitioner's position, it is admitted by him that under either theory, the crime committed would be murder in the first degree. A State may constitutionally inflict the death penalty in all cases of murder (as was the case at common law for centuries). Certainly an accused has no cause to complain because a jury in considering whether to inflict the death penalty or life imprisonment relies in part upon the above presumption.

The presumption as applied to the facts of this case is not the absurdity that Petitioner would have your Honorable Court believe. It was testified that the shot was fired because, "someone was coming out of the door". It was not specified as to whether the door referred to was that of the Feasterville Tavern or the Buck Tavern across the street. The shot was fired by the driver of the car from the left-hand side of the car (the side of the car on which Kelly was standing). The car was between ten and twenty feet from Kelly when the shots were fired. The car was just starting to move forward. Under these circumstances it seems to us that a jury might very well find that in fact these shots were aimed intentionally at the victim Kelly. We do not think that under these facts the presumption which Petitioner now challenges lacked any basis in reason. If we understand Petitioner's position correctly, it is in effect that it would have been impossible for a man to have succeeded in hitting Kelly with an aimed shot under the circumstances in this case. Whether the bullet which killed Kelly was intentionally aimed or purely a wild shot seems to us to be a question which only a jury could properly determine and in reaching this conclusion a jury might quite properly weigh the chance of a stray shot killing the victim as against the probability of a marksman hitting his target under all the circumstances, relying in part upon the presumption which Petitioner challenges.

Even if the question of whether or not the jury considered the intention with which the shot was fired raises any Federal Constitutional issue, we believe that no viola-

tion of due process occurred. First, because the charge as given by the Court has repeatedly been challenged and upheld as being a correct charge in murder cases wherein a deadly weapon is used on a vital part of the body and results in death. Secondly, because under the circumstances of this case there is ample evidence upon which a jury might determine that the shot which killed Kelly was a carefully aimed shot.

In conclusion, the Commonwealth reasserts its contention that a reliance in the presumption raises no Federal Constitutional issue in this case, because it had basis in fact and finally, if the jury considered or relied on this presumption at all, it did so only in relation to the penalty to be imposed, and not in determining the guilt or innocence of Petitioner.

The Commonwealth respectfully suggests that the opinion of the Supreme Court of Pennsylvania in the case now before your Honorable Court answers all of the problems raised by Petitioner, and we request that the Petition be dismissed.

Respectfully submitted,

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